

**REMARKS**

In the Office action mailed 11/8/04, claims 1-4, 6, 8-21 and 23-27 were rejected again under 35 U.S.C. 103(a) as being unpatentable over Kant, in view of Kirschenbaum. Applicant respectfully traverses this rejection. In order to maintain a rejection the Examiner has the burden of providing evidence of prima facie obviousness. See MPEP §2143. See also In Re Vaeck, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). In order to prove prima facie obviousness, the Examiner must provide evidence in the prior art of a motivation to combine or modify a reference, a reasonable expectation of success, and a teaching of each and every claimed element. Id.

Applicant asserts that the Examiner has **still** failed to make a prima facie showing of obviousness. The third requirement of an obviousness rejection under 35 USC 103(a) as explicitly stated in MPEP 2143, that the prior art references must teach or suggest all the claim limitations.

**MPEP 2143 BASIC REQUIREMENTS OF A PRIMA FACIE CASE OF OBVIOUSNESS**

To establish a prima facie case of obviousness, three basic criteria **must** be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine the reference teachings. Second, there must be a reasonable expectation of success. **Finally, the prior art references must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must be found in the prior art, not in the applicant's disclosure.**

Each of the independent claims 1, 8, 10, 12, 14, 16, 18, 24 and 26 contain the claim limitation of a sent counter. Applicant respectfully asserts that Kant (U.S. Patent No. 5, 563,874 does not teach, describe, or otherwise suggest a sent counter. Examiner has referred to Kant's use of a polling interval count as being equivalent to the sent counter of the present invention. However, a polling interval counter simply tracks occurrences of polling intervals, and is more accurately described as a clock, as the polling interval counter of Kant simply marks the passing of a time period (the polling interval). At the end of a polling interval, Kant teaches taking certain actions, namely performing calculations. Directing Examiner's attention to Kant at Col. 5, line 37, Kant discloses:

*In accordance with the present invention, a penalty factor is computed at the end of each polling interval.*

While the Examiner specifically refers to Kant at FIGS. 2 and 3 (block 202) and PI\_COUNT =0 and incrementation of PI-COUNT at block 303 as evidence that the polling interval counter is equivalent to the sent counter of the present invention, Examiner's attention is directed to Kant at col. 8 line 13:

*At the end of the polling interval, the count of polling intervals, PI\_count is incremented by one (step 301).*

This is not the same as saying that PI\_count is incremented each time something is sent. Even if Kant's PI\_counter could be modified to perform in the manner stated by the Examiner, The Examiner has provided no motivation to do so as required by case law and the MPEP. See MPEP §2143. If the Examiner is claiming that such motivation would be commonly known in the art, Applicants challenge this assertion and demand

evidence proving this as is required under §2144.03 of the MPEP. Otherwise, the rejection cannot be maintained.

Examiner failed to address the argument above, but cited in response to arguments that “Kant teaches that the PI\_COUNT is for sent messages (Col. 3 lines 30-33) referenced by the transmission of a poll message to a receiver. Therefore the PI\_COUNT represents a sent counter.”

Applicant respectfully traverses Examiner’s argument and finds nowhere in Kant is there any teaching of PI\_COUNT being a sent counter. Kant at Col. 3 lines 30-33 reads:

*“The transmitter periodically sends a poll message to the receiver to enquire of its status. In reply, the receiver sends a solicited status (stat) message, which contains a list of all currently existing gaps. The transmitter, in turn, retransmits all missing PDUs.”*

There is no mention of PI\_COUNT in the portion above, cited by the Examiner. If the Examiner wishes to continue the 35 U.S.C. 103(a) rejection on this ground, Applicant demands that Examiner provide proof of his assertion that PI\_COUNT is a sent counter, as well as address Applicant’s argument that PI\_COUNT is an interval counter, not a sent counter, as shown above in Kant col. 8 line 13.

## CONCLUSION

Applicant has addressed all grounds for rejection and objection as stated in the Office action mailed 11/08/04, and respectfully requests that the Examiner withdraw all rejections and place this application in condition for allowance.

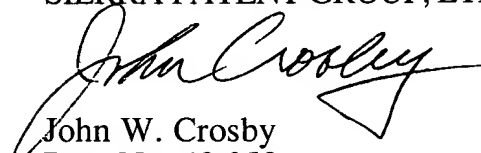
INVITATION TO TELEPHONE CONFERENCE

If any remaining issues exist, the Examiner is invited to call the undersigned attorney at the telephone number listed below.

Date: January 10, 2005

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Respectfully submitted,  
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